86-914

No.

In the Supreme Court of the United States

October Term, 1986

TIMOTHY S. MIHALCIK,
Petitioner,

vs.

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KENNETH P. FRANKEL
Counsel of Record
SMITH & SMITH ATTORNEYS
110 Moore Road
P.O. Box 210
Avon Lake, Ohio 44012
Telephone: (216) 933-3231
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED FOR REVIEW

Whether a federal district court may, pursuant to the Federal Interpleader Acts and 28 U.S.C. § 2361 in particular, enjoin collection of a valid state court judgment against the general assets of the judgment debtor or whether the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution; the Full Faith and Credit Statute, 28 U.S.C. § 1738; and the Anti-Injunction Act, 28 U.S.C. § 2283 prohibit a federal court from issuing such an injunction.

PARTIES BELOW

Parties before the United States Court of Appeals for the Seventh Circuit were Timothy S. Mihalcik as Appellant and Illinois Employers Insurance of Wausau as Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

No.

In the Supreme Court of the United States

October Term, 1986

TIMOTHY S. MIHALCIK,
Petitioner,

VS.

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, not yet reported, also appears in the appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner Timothy S. Mihalcik respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 17, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS

The full text of Article IV Section 1 of the United States Constitution appears in the appendix hereto.

STATUTORY PROVISIONS

The full text of the following statutory provisions appears in the appendix hereto:

28 U.S.C. § 1335
28 U.S.C. § 1738
28 U.S.C. § 2283
28 U.S.C. § 2361
Ohio Revised Code § 3929.06

STATEMENT OF CASE

On November 4, 1976, Respondent Illinois Employers Insurance of Wausau (hereinafter "Illinois Employers") issued a policy of products liability insurance to Rapperswill Corporation, Rapco, Inc., Rapco Foam, Inc. and Rapco Foam Distributing Corporation. These insured entities were in the business of the manufacture and distribution of an insulation material known as ureaformaldehyde foam.

On September 11, 1978, Petitioner Timothy S. Mihalcik (hereinafter "Mihalcik") commenced an action in the Lorain County Court of Common Pleas, Elyria, Ohio alleging faulty installation of the foam against the installer, M & M Home Insulation, Inc. (not a party herein). On April 10, 1980, as a result of Mihalcik's filing an amended

complaint, one of Illinois Employers' insureds, Rapperswill Corporation, was made a new party defendant. Mihalcik's amended complaint alleged, *inter alia*, personal injury as a result of noxious off-gassing of the foam.

On May 18, 1983, pursuant to 28 U.S.C. § 1335, Illinois Employers commenced an interpleader action in the United States District Court for the Northern District of Illinois, Eastern Division naming many parties as defendants, including Mihalcik. Various claims for personal injury as the result of noxious off-gassing of the foam had been made throughout the United States against Illinois Employers and its insureds regarding the above-mentioned policy of products liability insurance.

Illinois Employers deposited funds with the Registry of the District Court which funds allegedly represent all of the funds which can be paid claimants pursuant to the aggregate limits of liability on the above-mentioned insurance policy. Illinois Employers seeks in this interpleader action to be discharged from any claims of the various parties made defendants in the interpleader action.

On June 8, 1983, Mihalcik obtained a judgment in the Lorain County Court of Common Pleas, Elyria, Ohio against Rapperswill Corporation. On July 12, 1983, Mihalcik filed a supplemental complaint pursuant to § 3929.06 of the Ohio Revised Code which named Illinois Employers and others (not parties herein) as defendants. On August 24, 1984, Mihalcik obtained a judgment in the amount of $21,071.42 against Illinois Employers in the Lorain County Court of Common Pleas.

On October 4, 1985, Illinois Employers moved the District Court to enjoin Mihalcik from attempting collection on Mihalcik's Ohio judgment except in the interpleader

action. On November 26, 1985, the District Court enjoined Mihalcik from prosecuting any action or otherwise attempting to satisfy Mihalcik's judgment except in the interpleader action.

Mihalcik appealed the decision and order of the District Court to the United States Court of Appeals for the Seventh Circuit which on September 17, 1986 affirmed the decision and order of the District Court.

REASONS FOR GRANTING THE WRIT

This Court has recently resolved various issues concerning the preclusive effect of state court judgments on federal actions: *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984) which involved the preclusive effect of a state court judgment on a subsequent federal claim brought pursuant to 42 U.S.C. § 1983; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. ..... (1985) which involved the preclusive effect of a state court judgment on a subsequent federal antitrust proceeding; and *Parsons Steel, Inc. v. First Alabama Bank*, ... U.S. ..... (1986) which involved the preclusive effect of a state court's resolution of a *res judicata* issue on a subsequent federal action.

This case requires resolution of another issue regarding the preclusive effect of a state court judgment on a federal proceeding—in this instance, a federal interpleader action: whether a federal district court may, pursuant to 28 U.S.C. § 2361, enjoin collection of a state court judgment or whether the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution; the Full Faith and Credit Statute, 28 U.S.C. § 1738;

and the Anti-Injunction Act, 28 U.S.C. § 2283 prohibit a federal court from issuing such an injunction.

The Court of Appeals, noting that there was no precedent for resolution of the specific factual situation before the Court[1] held that:

> Where a claimant sues an insured party, and subsequently the insurance company files a federal interpleader action and deposits the limits of its coverage under the insured's policy with the court, a default judgment[2] obtained by the claimant against the insurance company based solely upon the insurance policy is still subject to the interpleader action.

Mihalcik submits that the public policy consideration underlying the Court of Appeals' decision is misplaced. The Court of Appeals determined (footnote 3) that if the Court of Appeals "were to hold for Mihalcik, then every one of the hundreds of claimants against Illinois Employers could likewise pursue default judgment, requiring Illinois Employers to respond or else be liable beyond the limits of its policy with the insureds".

Mihalcik knows of no authority which supports the proposition that an insurance company should be relieved

---

1. "Neither party has cited any precedent, and we are aware of none, where the claimant against the insured party has, subsequent to the interpleader action, obtained a default judgment against the stakeholder insurance company on the basis of its derivative liability," Court of Appeals' opinion at 4.

2. Although the Court of Appeals apparently placed some weight on the fact that Mihalcik's judgment was a default judgment, under Ohio law a default judgment has the same validity as any other type of judgment, *Davis v. Teachnor*, 53 N.E.2d 208 (Franklin County 1943). Thus, the characterization of Mihalcik's judgment as being a default judgment, although accurate, is irrelevant with respect to the validity and effectiveness of the judgment.

of the burden of defending suits on the basis that the defendant has too many claims to defend in various courts throughout the United States. Obviously, the burden of defending various suits is part and parcel of the cost of doing business of a liability insurance carrier. Likewise, an insurance company should not be relieved of the "burden" of defending various actions, resulting from the torts committed by its insured, because of the expense or inconvenience involved.

The District Court should have given the same effect to the Ohio judgment as that given to it by the courts of the State of Ohio, *Badger Dome Oil Company v. Hallam*, 99 F.2d 293 (8th Cir. 1938). Mihalcik's Ohio judgment conclusively determined Illinois Employers' direct (as opposed to derivative) monetary liability to Mihalcik, *Doyle v. West*, 70 Ohio St. 438 (1899). Under Ohio law, Mihalcik is entitled to collect on his judgment from the general assets of Illinois Employers and is not limited to collecting from a specific fund.

The Court of Appeals essentially determined that in the context of a federal interpleader action, there is no distinction between a mere claim and a state court judgment, apparently adopting the District Court's determination that Mihalcik's judgment "merely establish(es)" Mihalcik may potentially share in the interplead funds. Such determinations ignore the meaning and effect of an Ohio judgment.

Although there are certain exceptions to the prohibition of federal court's enjoining state court proceedings, 28 U.S.C. § 2283, none of these exceptions applies to the case at bar. Although 28 U.S.C. § 2361 does permit district courts to issue orders enjoining claimants from instituting or prosecuting any proceeding affecting the

interpleader *res,* Mihalcik was not "instituting" or "prosecuting" any proceeding affecting the interplead funds at the time Illinois Employers moved for injunctive relief. Mihalcik readily agrees that the interplead funds cannot be attached by Mihalcik to satisfy his judgment. However, Mihalcik did not seek to attach the interplead funds to satisfy his judgment.

Mihalcik should be allowed to satisfy his judgment from the general assets of Illinois Employers in the ordinary course of law, *Preferred Risk Mutual Insurance Company v. Greer,* 289 F. Supp. 261 (D. S.Car. 1968). For the reason that 28 U.S.C. § 2361 applies *only* to those matters affecting the funds involved in the interpleader action, the District Court should only have enjoined Mihalcik from satisfying his judgment from the interplead funds.

The issues raised herein are significant to the orderly relationship between the state and federal court systems. The concept of "full faith and credit" is meaningless if federal courts may place limitations on the meaning, effect and enforceability of state court judgments.

Mihalcik readily agrees that Illinois Employers is entitled to proceed with its interpleader action regardless of whether or not Mihalcik has an outstanding judgment against it. However, if Illinois Employers wishes to attack the judgment, Illinois Employers should be required to attack the judgment in the state court which rendered the judgment.

The District Court's order resulted in a relitigation in a federal court of an issue (whether or not Illinois Employers is indebted to Mihalcik and to what degree) which had already been determined by a state court.

Clearly, the courts below have allowed the federal interpleader statute to become the "all purpose bill of peace" which this Court previously determined it was not intended to be, *State Farm Fire and Casualty Company v. Tashire*, 386 U.S. 523 (1967).

Respectfully submitted,

KENNETH P. FRANKEL
Counsel of Record
SMITH & SMITH ATTORNEYS
110 Moore Road
P.O. Box 210
Avon Lake, Ohio 44012
(216) 933-3231
Attorney for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Decided September 17, 1986)

No. 85-3195

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Plaintiff-Appellee,

v.

RAPCO FOAM, INC., *et al.*,
Defendants,

and

TIMOTHY S. MIHALCIK,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
No. 83 C 3440—FRANK J. MCGARR, *Chief Judge.*

Before BAUER, and WOOD, JR., *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

WOOD, JR., *Circuit Judge.* This appeal arises out of an interpleader action filed by Illinois Employers Insur-

---

*The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

ance of Wausau ("Illinois Employers") against the numerous claimants who filed actions for damages against Illinois Employers' insureds, Rapco Foam, Inc. and Rapperswill Corporation. Appellant Timothy Mihalcik is a defendant in the federal statutory interpleader action and a plaintiff in an Ohio action against Rapperswill Corporation. Mihalcik obtained a default judgment against Illinois Employers in Ohio in the action originally filed by Mihalcik against Rapperswill Corporation. Illinois Employers obtained an injunction from the district court prohibiting Mihalcik from prosecuting or commencing any action in any court against Illinois Employers except in the federal statutory interpleader action. Mihalcik appeals the district court's decision to grant the injunction. We affirm.

Between November 4, 1976 and December 4, 1977, Illinois Employers insured Rapco Foam, Inc. and Rapperswill Corporation. The insureds have since been adjudicated bankrupt in an unrelated proceeding in South Carolina. On May 18, 1983, Illinois Employers filed this interpleader action and deposited with the district court the balance of the coverage under the limits of the policy, $73,750. Mihalcik is one of the several hundred claimants named in the interpleader action whose aggregate claims exceed $10,000,000.

Mihalcik and his family had previously filed suit against Rapperswill Corporation in the Court of Common Pleas, Lorain County, Ohio. On June 8, 1983, Mihalcik and his family recovered default judgments of $175,000 in the Ohio proceeding. Mihalcik's own judgment was for $50,000. On July 12, 1983, Mihalcik and his family filed a supplemental complaint in the Ohio proceeding which added Illinois Employers (along with other insurers of Rapperswill Corporation) as "new party defendants" in an attempt

to collect the judgments entered against Rapperswill Corporation. On August 24, 1984, Mihalcik and his family obtained a default judgment against Illinois Employers in the amount of $73,750, of which $21,071.42 was for Mihalcik.[1]

Counsel for Mihalcik notified Illinois Employers of the default judgments in a letter dated August 16, 1985. On October 4, 1985, Illinois Employers moved in the federal statutory interpleader action for an injunction to prevent Mihalcik from attempting to collect a judgment against Illinois Employers except in the interpleader action. Chief Judge McGarr issued the injunction on November 25, 1985.

Mihalcik claims that the trial court's decision to issue the injunction was erroneous because Mihalcik was not attempting to attach the interpleader funds. Mihalcik argues that he got a general judgment against Illinois Employers in the Ohio proceeding and therefore his attempt to recover in Illinois does not affect the interpleader funds. We disagree.

It is true that, under 28 U.S.C. § 2361, the district court may only enjoin claimants from instituting any proceedings "affecting the property, instrument or obligation involved in the interpleader action." In this case, the claim clearly affects the obligation involved in the interpleader action. Mihalcik concedes in his brief that his "claim against [Illinois Empolyers] in the Lorain County Court of Common Pleas arose out of the policy of liability insurance which is also the subject of the interpleader ac-

---

1. There is apparently some question about the validity of the Ohio judgment against Illinois Employers, but that is not before us on this appeal. We will assume that the judgment is valid.

tion."[2] Mihalcik fails to allege any other legal theory upon which Illinois Employers might be liable to him. We conclude, therefore, that Mihalcik's claim falls squarely within the district court's authority under 28 U.S.C. § 2361 to enjoin attempts by claimants to attach the *res* subject to a statutory interpleader action. Mihalcik concedes that Illinois Employers is liable to him only on the insurance policy covering Rapperswill Corporation, and Illinois Employers has deposited the extent of its coverage under the insurance policy with the district court. Indeed, Mihalcik concedes that the trial court had the authority to enjoin him from attaching the interpleader funds.

Mihalcik argues that his claim does not fall within section 2361 because he has already obtained a default judgment against Illinois Employers itself. Neither party has cited any precedent, and we are aware of none, where the claimant against the insured party has, subsequent to the interpleader action, obtained a default judgment against the stakeholder insurance company on the basis of its derivative liability. The fact that Mihalcik has obtained a default judgment against Illinois Employers in the Ohio action (on the basis of the claim which is subject to the pending federal interpleader action) does not, we believe, change the fact that Mihalcik is attempting to attach the *res* of the interpleader action. Although Mihalcik has made a resourceful attempt to circumvent the interpleader action, to allow Mihalcik to prevail on his attempt would encourage the multiple litigation and and "race to judgment," *see State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 533 (1967), which the inter-

---

2. This is underscored by the fact that the Mihalcik family sought the exact amount of damages from Illinois Employers that Illinois Employers had already deposited with the district court in the interpleader action.

pleader procedure is intended to prevent. We hold, therefore, that where a claimant sues an insured party, and subsequently the insurance company files a federal interpleader action and deposits the limits of its coverage under the insured's policy with the court, a default judgment obtained by the claimant against the insurance company based solely upon the insurance policy is still subject to the interpleader action.[3]

Having placed Mihalcik's Ohio judgment against Illinois Employers in the proper perspective, it is clear that Mihalcik's full faith and credit argument is without merit. Mihalcik cites no authority for his argument that a district court violates full faith and credit considerations by properly enjoining one of many adverse claimants in a statutory interpleader action from attaching the *res*. The fact that Mihalcik has reduced his derivative claim against the stakeholder to a judgment does not affect the interpleader action. *See In re Bohart*, 743 F.2d 313, 325 (5th Cir. 1984).

Mihalcik's laches argument is likewise without merit. Illinois Employers moved for an injunction less than two months after being notified by Mihalcik's counsel of the Ohio default judgment. Moreover, Mihalcik has suffered

---

3. We are mindful of the fact that, assuming the insurance company has proper notice of the proceedings and the other statutory and constitutional requirements for jurisdiction are met, the insurance company can take steps to avoid default judgments in the state courts. We note, however, that if we were to hold for Mihalcik, then every one of the hundreds of claimants against Illinois Employers could likewise pursue default judgments, requiring Illinois Employers to respond or else be liable beyond the limits of its policy with the insureds. The purpose of interpleader is to allow a party who concedes liability to have conflicting claims against it resolved in one forum. It would be inconsistent with that purpose to require the stakeholder to also defend itself in hundreds of state court actions concerning the same claims.

no damage by the passage of time. The decision of the district court is AFFIRMED.

Clerk of the United States Court of Appeals for the Seventh Circuit

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Dated November 25, 1985)

No. 83 C 3440

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Plaintiff,

v.

RAPCO FOAM, INC., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This cause is before this court on the motion of plaintiff Illinois Employers Insurance Of Wausau ("Employers") to enjoin Timothy Mihalcik and all other plaintiffs in Cause No. 83508, pending in the Court of Common Pleas, Lorain County, Ohio, from prosecuting any action in any court against Employers other than in this interpleader action. For the reasons contained herein, Employer's motion is granted.

Employers has deposited $73,750 with this court. This amount, Employers asserts, represents the remainder of Employers' policy limits under its insurance policy with defendants Rapco Foam, Rapperswill Corporation, Rapco, Inc., and Rapco Foam Distributing Corporation ("the Rapco defendants"). The claims of the other several hundred defendants in this interpleader action, including Timothy

Mihalcik, exceed $10,000,000. Obviously, given the limited funds deposited with this court, the claims of the non-Rapco defendants are adverse to one another.

Timothy Mahalcik and the other plaintiffs in the Ohio action ("the Ohio plaintiffs") have obtained default judgments against Employers in the total amount of $73,750 pursuant to their supplemental complaint. Employers asks this court to enjoin the Ohio defendants from executing on those judgments except in this interpleader action.

This court is empowered in a civil interpleader action to enter orders restraining claimants from proceeding in any state court affecting the property involved in the interpleader action. 28 U.S.C. § 2361. The Ohio plaintiffs contend, however, that § 2361 does not apply to them because the Ohio action has been reduced to judgment. They argue that there is no pending action to enjoin.

A stakeholder's right to interplead is not defeated by the fact that a claimant has an outstanding judgment. *Matter of Bohart*, 743 F.2d 313, 325 (5th Cir. 1984). *See also State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 535 (1967) (interpleader's interest is satisfied when court restrains claimants from seeking to enforce against insurance company any judgment obtained against its insured); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (interpleader action based upon inconsistent judgments rendered by two state courts). That the Ohio plaintiffs have obtained judgments against Employers neither makes Employers' interpleader action moot nor makes § 2361 inapplicable to this case.

The Ohio plaintiffs also contend that Employers' motion should be denied because they obtained a general judgment against Employers and thus, the interpleader

funds are not affected. Based upon the limited record before this court, it is clear that Employers was named by the Ohio plaintiffs in their supplemental complaint in Ohio because they had obtained a judgment against Employers' insured. Employers is derivatively liable to the Ohio plaintiffs under Employers' policy with its insured. The extent of Employers' liability under that policy has been deposited with this court. Hence, the Ohio plaintiffs must satisfy their judgments against Employers from this fund.

Finally, the Ohio plaintiffs argue that this interpleader action should not be used to defeat the *res judicata* effect of the judgments entered by the Ohio court. The Ohio plaintiffs' judgments, however, are not *res judicata* with respect to their right to satisfy their claims in full against Employers. The judgments merely establish that the Ohio plaintiffs potentially may share in the fund.

This case is not unlike a bankruptcy. Hundreds of claimants seek to satisfy their claims from a limited estate. This court is unwilling to allow the Ohio plaintiffs to satisfy their judgments and exhaust the fund merely because they obtained judgments earlier than the other claimants.

For the foregoing reasons, the Ohio plaintiffs are enjoined from prosecuting any action, including attempts to satisfy their judgments, to recover from Employers under Employers' insurance policy with the Rapco defendants except in this interpleader action.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

JUDGMENT ENTRY OF THE SEVENTH CIRCUIT COURT OF APPEALS

(Dated September 17, 1986)

No. 85-3195

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUDGMENT—ORAL ARGUMENT
Before
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Plaintiff-Appellee,

v.

RAPCO FOAM, INC., *et al.*,
Defendants,

v.

TIMOTHY S. MIHALCIK,
Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
No. 83 C 3440 FRANK J. MCGARR, *Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

---

*Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

CONSTITUTIONAL PROVISIONS

Article IV Section 1 of the United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

STATUTORY PROVISIONS

28 U.S.C. § 1335

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are

claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical but are adverse to and independent of one another.

28 U.S.C. § 1738

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 2283

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2361

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

Ohio Revised Code § 3929.06

Upon the recovery of a final judgment against any firm, person, or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, or for loss or damage to a person on account of bodily injury to one's spouse or minor child or children, if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or the successor in interest is entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment is not satisfied within thirty days after it is rendered, the judgment creditor or the successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file a supplemental petition in the action in which said judgment was rendered, in which the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action.

No. 86-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TIMOTHY S. MIHALCIK,

Petitioner,

vs.

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

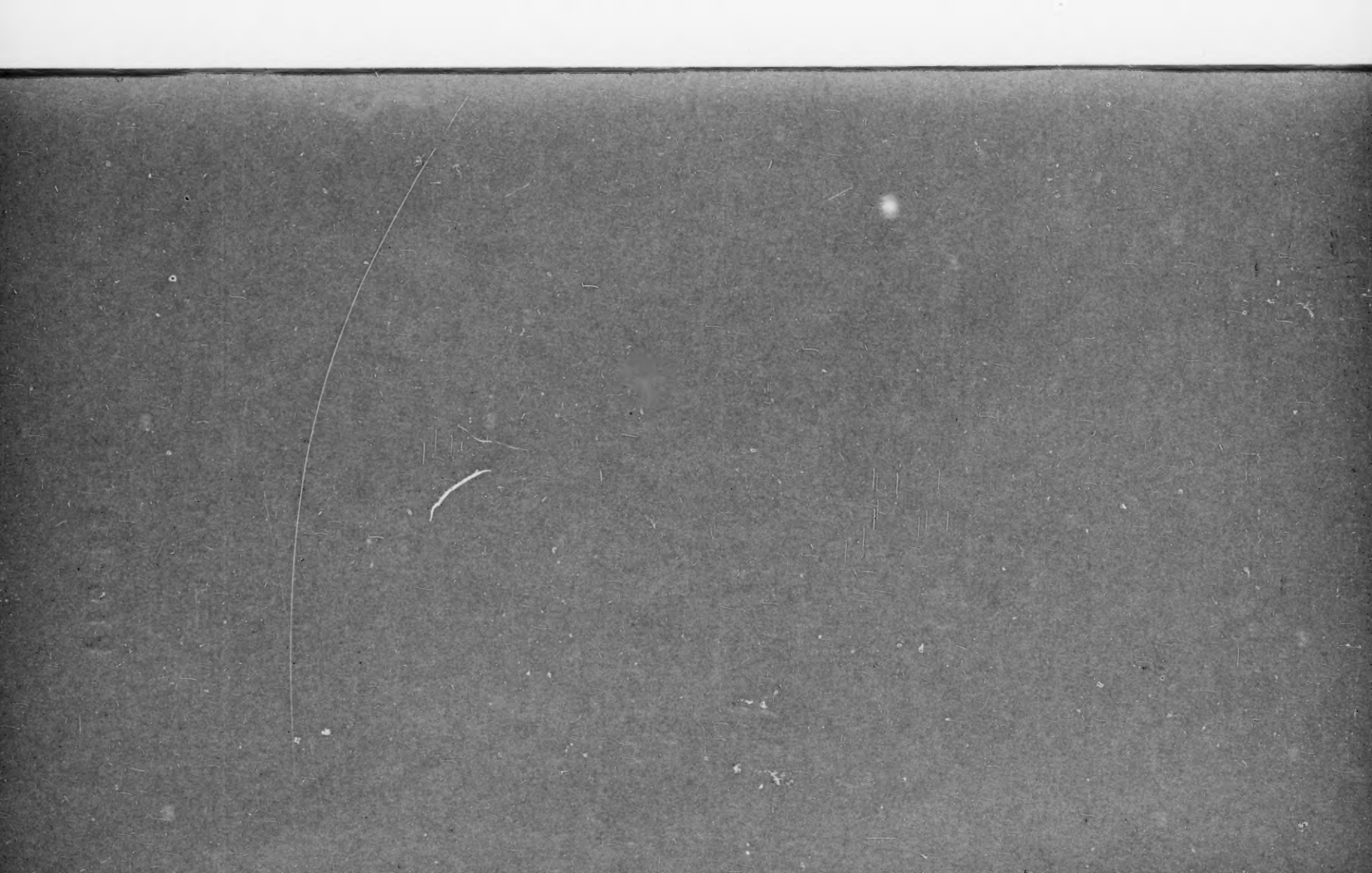
RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH B. LEDERLEITNER *
PRETZEL & STOUFFER, CHARTERED
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973
Attorneys for Respondent

ROBERT MARC CHEMERS
Of Counsel

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220



QUESTIONS PRESENTED

There are no questions of sufficient significance to require the granting of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

Supreme Court of the United States

October Term, 1986

TIMOTHY S. MIHALCIK,

Petitioner,

vs.

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately described in the Petition, except that the Seventh Circuit opinion has been reported at 801 F.2d 949.

STATEMENT

The statement of facts in the Petition is full of loaded descriptions designed to create a misleading impression

of the facts of this case. Respondent, however, will limit itself to correcting only important procedural facts.

The Respondent insurance company filed a federal statutory interpleader action in the district court against its insured, Rapco Foam, Inc. and Rapperswill Corporation, and against the various individuals who filed actions for damages for personal injuries and property damage against the Respondent's insureds.

Respondent issued a certain policy of insurance to its insureds which provided coverage in the amount of $250,000.00 excess of a $50,000.00 per claim self-insured retention for the period of November 4, 1976 to December 4, 1977. The insureds have been adjudicated bankrupt in separate proceedings in the United States Bankruptcy Court for the District of South Carolina. Respondent deposited the balance of the aggregate policy limits, $73,750.000, into the Registry of the district court.

Timothy S. Mihalcik, the Petitioner herein, is an interpleader defendant. Petitioner is also a party plaintiff in an action pending against the Respondent's insured Rapperswill Corporation in the Court of Common Pleas, Lorain County, Elyria, Ohio. On June 8, 1983, Petitioner and his family members recovered default judgments against the Respondent's insured in the Ohio proceedings in the amount of $175,000.00. Respondent's judgment is in the amount of $50,000.00.

On July 12, 1983, Petitioner and his family members filed a Supplemental Complaint against Respondent and other insurers of Rapperswill Corporation added as "new party defendants", in which action Petitioner sought to collect the judgments entered against the insurance company defendants' insured. On August 24, 1984, Petitioner obtained a default judgment against Respondent in the

Ohio proceedings in the amount of $21,071.42. The aggregate judgments for Petitioner and his family members total $73,750.00.

Petitioner, through counsel, notified Respondent of the outstanding judgments by letter dated August 16, 1985. Respondent thereafter moved in its federal statutory interpleader action to enjoin Petitioner from attempting to collect those judgments against Respondent except in the federal statutory interpleader action.

The District Court enjoined Petitioner by its Memorandum Opinion and Order dated November 25, 1985. Petitioner appealed that ruling, and the Court of Appeals affirmed. 801 F.2d 949 (7th Cir. 1986).

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT AND THE PETITION RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS AS DEFINED BY THIS COURT'S RULE 17.

Respondent cannot discern which consideration governing review on certiorari, as set forth in Rule 17 of the Rules of the Supreme Court, petitioner claims is applicable to the decision of the Seventh Circuit in this case. This action is simply not worthy of certiorari.

In addition to the lack of conflict with any decision of the United States Supreme Court, Petitioner's argument contains factual and logical difficulties which make his purported constitutional claims murky at best.

Petitioner notified the Respondent, Illinois Employers Insurance of Wausau, that it owed him $73,750.00 because of certain default judgments obtained in supplemental proceedings brought in Ohio after the entry of default judgments against the Respondent's insured and in favor of Petitioner.

Respondent filed a federal statutory interpleader action in the district court on May 18, 1983. Petitioner is a party defendant as a result of his having filed an action for damages for personal injuries and property damage against the Respondent's insured in the Court of Common Pleas, Lorain County, Elyria, Ohio.

Illinois Employers moved in the district court, for the court to enjoin Mihalcik from attempting to collect on the default judgments against the Respondent, pursuant to 28 U.S.C. §2361. The District Judge had the power pursuant to §2361 to enjoin proceedings "affecting the property, instrument or obligation involved in the interpleader action." 28 U.S.C. §2361; *Travelers Indemnity Co. v. Greyhound Lines, Inc.*, 260 F.Supp. 530, 535 (W.D. La. 1966), *aff'd per curiam*, 377 F.2d 325, 328 (5th Cir. 1967), *cert. denied*, 389 U.S. 832 (1968); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 533-534 (1967).

An interpleader action is designed to protect a stakeholder, as such, from the possibility of multiple claims upon a single fund. *Maryland Casualty Co. v. Glassell-Taylor & Robinson*, 156 F.2d 519 (5th Cir. 1964). To this end the interpleader statutes and rules are "liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from double liability." *New York Life Insurance Co. v. Welch*, 297 F.2d 787, 790 (D.C. Cir. 1961). A stakeholder's right to interplead is not necessarily defeated by the fact that an interpleader claimant has an outstanding judgment against the

stakeholder. 3A *Moore's Federal Practice* 22.08[1] n.4 (1984); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (interpleader proceeding in which both claimants had previously secured judgments against the stakeholder).

There is no question but that interpleader jurisdiction extends to the *res*, that is, the interpleader fund. *Consolidated Coal v. Bailey*, 467 F.2d 1124 (3d Cir. 1972), *affirming*, 330 F.Supp. 474 (W.D. Pa. 1971); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425 (10th Cir. 1966), *cert. denied*, 386 U.S. 977, *reh. denied*, 386 U.S. 1043. An injunction is unquestionably proper with respect to proceedings against the fund itself. *Travelers Indemnity Co. v. Greyhound Lines, Inc.*, 377 F.2d 325, 328 (5th Cir. 1967) (per curiam), *cert. denied*, 389 U.S. 832, 88 S.Ct. 101, 19 L.Ed.2d 91 (1968), *affirming*, 260 F.Supp. 530 (W.D. La. 1966).

Petitioner has frankly *admitted*, in his brief to the Seventh Circuit at page 19, that his claim against Respondent "arose out of the policy of liability insurance which is also the subject of the interpleader action." Respondent has no liability whatsoever to Petitioner other than what could or might emanate from the policy of insurance it issued to Rapperswill Corporation, the original defendant in the Ohio proceedings commenced by Petitioner. Petitioner obtained a default money judgment against Respondent's insured. In what can only be regarded as an attempt to collect that judgment, Petitioner filed a Supplemental Complaint in the Ohio proceedings against Respondent and three other insurers of Rapperswill Corporation. In fact, Paragraph 5 of the Supplemental Complaint alleges the following:

> "5. Plaintiffs are entitled to have the insurance money provided for in the above-mentioned contracts of insurance between the new party defendants Illinois Employers Insurance of Wausau, Admiral Insur-

> ance Company, and Ambassador Insurance Company and defendant Rapperswill Corporation applied to satisfaction of the judgments by Plaintiffs against Rapperswill Corporation."

Contrary to the bald unsupported assertions of Petitioner, the enjoinder of Petitioner from attempting to collect his default judgment does not concern itself with any aspect of the application of the doctrine of "full faith and credit" under 28 U.S.C. §1738 or any other provision with respect to a purported valid state court judgment. The default judgments obtained by Petitioner against Respondent total $73,750.00, which figure represents the amount of the fund deposited by Respondent with the district court in its federal statutory interpleader action.

II.

EVEN IF AN ISSUE WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI PURSUANT TO THIS COURT'S RULE 17 EXISTED, RESPONDENT IS NOT LIABLE TO PETITIONER AS A MATTER OF LAW.

Petitioner has conceded, in his brief to the Seventh Circuit at page 19, that his claim against Respondent arises out of the insurance policy Respondent issued to the tort defendant in the Ohio proceedings brought by Petitioner. Petitioner's individual judgment is in the amount of $21,071.42. The insurance policy provides as follows:

> "1. The company shall be liable only for the amount of damages payable which is in excess of the retention amount up to the applicable limit of liability stated in the declarations."

The "retention amount" is $50,000.00 for each occurrence. The judgment falls within the self-insured retention of Rapperswill Corporation, hence Respondent has no liability whatsoever. The obligation of Respondent under its policy of insurance, if any, have not been triggered.

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

JOSEPH B. LEDERLEITNER *
PRETZEL & STOUFFER, CHARTERED
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973
Attorneys for Respondent

ROBERT MARC CHEMERS
Of Counsel

* Counsel of Record